Constitutional Conflicts

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In a recent post, my good friend and colleague José Luis Martí usefully describes the decision recently rendered by the Spanish Supreme Court convicting several Catalan secessionist leaders of a number of crimes in connection with the political events that developed in Catalonia in September and October 2017. According to Martí, the Supreme Court's ruling is not only "unjust and legally wrong", but is also unconstitutional, "since it compromises the fundamental democratic rights of protest - the freedom of expression, the freedom of assembly, and the right to demonstrate". I disagree with his conclusion and with some of the points he makes to support it.

Before I argue my case, let me be clear that I fully share Martí's opinion, powerfully articulated in previous posts, that the events we witnessed in September and October 2017 in Catalonia amounted to a "*coup d'etat* from the standing point of Spanish constitutional legality". That's exactly how we should characterize the grave attempt at subverting the constitutional order that took place at that time.

To make the story short, readers should recall that in September 2017 the Catalan parliament passed two crucial statutes that explicitly cancelled the effects of the Spanish Constitution in the Catalan territory. Working on the assumption that the Catalan people is sovereign, the Catalan legislature enacted a statute (Law 19/2017) that established the rules for holding a referendum on independence. Importantly, the statute provided that if more votes were cast in favor of independence than against it, the automatic legal consequence would be the declaration of independence of Catalonia. The other statute (Law 20/2017) regulated all the issues that would arise if Catalonia declared its independence from Spain, regarding nationality, the status of civil servants working for the Spanish institutions, taxes, international relations, and a host of other matters.

The Spanish Constitutional Court, at the request of the Spanish government, ordered the Catalan authorities to stop the implementation of those statutes. The judicial orders were patently disregarded, however, and the referendum was held on October 1. The "Yes" vote won (89%), though only 43% of citizens participated, so the Catalan parliament formally declared independence on October 27, after some weeks of hesitation. As a response, the Spanish government used article 155 of the Spanish Constitution, which empowers it to adopt extraordinary measures to neutralize decisions by regional governments that breach constitutional and legal norms or gravely imperil the general interest of Spain. The authorization of the Senate is needed for these purposes. On the basis of article 155, the Spanish government dissolved the Catalan parliament and called early elections in Catalonia. The members of the regional cabinet were removed. In those elections, the secessionist parties did not get the majority of the popular vote, but they obtained a majority of the legislative seats, so they managed to install a president that insists on breaking away from Spain. The extraordinary measures taken by the Spanish government were lifted once the new Catalan government was formed. Uncertainty

remains concerning the future steps the secessionist leaders will take. One of the catchphrases they are currently using is “We’ll do it again”. Whether this is mere rhetoric or something more serious, only time will tell.

So I side with Martí when he characterizes the events just described as a *coup d’état*, even if it is different from the traditional military *coup*. The next question, then, is whether the actions perpetrated by the leaders of the secessionist movement can be understood to be crimes under Spanish law, and whether the Spanish Constitution or international law protects those actions in the name of fundamental rights, including the right to protest. The Spanish Supreme Court deals with these issues in its lengthy opinion. Martí contends that the Court goes wrong in several places.

Formal aspects

Martí makes a preliminary point that goes to the formal aspects of the Court’s opinion. He asserts that it is “telling” that the Court “spends less than 40 pages describing the proven facts of the case, and only 10 pages to justify the charge of sedition, while it spends 193 pages, 40% of the whole text, arguing that no fundamental right of the defendants had been violated during the process”. He contends that the Court has issued a “defensive ruling”, as if judges were concerned about appeals to the Constitutional Court and the European Court of Human Rights.

First of all, it is not accurate to say that only 40 pages are devoted to describing the proven facts. In addition to those 40 pages, the Court spends 180 pages to describe the actions performed by each of the accused persons, and to justify its findings of fact in light of the evidence produced at the trial.

More importantly, I don’t understand why the Court should be criticized for taking seriously all the arguments based on fundamental rights made by the lawyers in defense of the secessionist leaders. Instead of focusing on the Criminal Code exclusively, the Supreme Court takes into account the Spanish Constitution and the relevant international legal instruments to make sure that no fundamental rights are breached. Since counsel made a large number of claims based on fundamental rights, we would expect the Supreme Court to fully reason its answer. If the Court had been brief in this part of its opinion, we would rightly criticize it for its lack of constitutional sensitivity. Actually, what impresses me most when I read this section of the Court’s opinion is how carefully it deals with the arguments proffered by counsel, some of which were really very implausible, such as the argument that says that the actions in question were shielded against the operation of the Criminal Code because international law empowers Catalonia to unilaterally secede from Spain, or that no crime was committed because the leaders were exercising their “right to civil disobedience”. The Court does not quickly dismiss such claims, but it instead works out a rather pedagogical and detailed answer to them.

I find it laudable, for example, that the first issue the Court tackles concerns the use of the Catalan language by the persons accused at trial. The Court devotes 13 pages to exploring the relevant domestic and international sources of law on

this matter, and to explicating the reasons justifying the position it had taken at the beginning of the trial. The Court had allowed the accused persons to speak in Catalan, if they so wished, and had made two translators available to them who would translate their utterances after they were made, so that everybody present at trial or watching it through the public media would be able to follow. The secessionist leaders finally chose to speak in Spanish, but they were given that option.

Rebellion and sedition

Let us now turn to the content of the Court's opinion regarding the crimes the leaders were charged with. Martí has no objection to the Court's findings that there was disobedience of judicial orders, as well as misappropriation of public funds.

Martí agrees with the Court that the actions cannot be classified as "rebellion. Martí argues that article 472 of the Criminal Code requires violence of a very specific kind, a form of violence that is conducive to the breach of the constitutional order. "And", he adds, "everyone knows – in Spain and worldwide – that the Catalan secessionist movement has been, until now, essentially peaceful and civic".

I think there is some confusion here. Yes, the movement has been "essentially" peaceful and civil (until now), but this does not exclude that a number of violent actions were performed by some people as part of the secessionist strategy. Evidence of such actions was brought to the trial, and the Court found the evidence compelling. What drove the Court to finally reject the crime of rebellion was its judgment that those acts were clearly insufficient to achieve secession effectively. The Court further noted that, as a matter of fact, the leaders deceived the masses: while they explicitly said they were struggling for Catalan independence by way of the referendum and the laws they passed, in reality they merely wanted to bring pressure on the Spanish government to force it to negotiate the independence of Catalonia. One may agree or disagree with the Court's holding on this point, which some commentators find a bit contradictory, but it is important for the record to note that the Court found that forms of violence had been engaged in, though not of the relevant kind for purposes of the crime of rebellion.

The Court deemed the actions in question to count instead as "sedition", as defined by article 544 of the Criminal Code. Martí provides us with an English translation of the conduct described in this provision, but the translation is incomplete. Martí writes that the article punishes "a public and tumultuous uprising with the aim of unlawfully preventing the enforcement of the law, or the functioning of any public authority, or the enforcement of any administrative or judicial decision". But Martí silences that the article explicitly says "by force or through illegal means" ("*por la fuerza o fuera de las vías legales*"). This is important, since some of Martí's objections make no sense in light of the actual text. He argues that we should interpret the article to require some element of violence and some significant harm. Given that the article says "by force or through illegal means", I need to hear more from Martí as to why we should read the article to require some element of violence. The particle "or" conveys a clear message that violence is not required.

As to harm, Martí makes a rather astonishing assertion at this juncture. He writes: “To be fair, the only real harm that was produced in those weeks of September and October of 2017, as everyone knows, was the harm of the police officers beating with their sticks hundreds of voters in the referendum trying to scare them and prevent them from voting”. To be clear, I was appalled by the images of police brutality on October 1, and I hope that the courts that are handling these cases currently under investigation will impose the pertinent legal sanctions to the officers who acted that way. But this does not detract from the fact that “real harm”, of significant quality, was caused by the secessionist leaders as well. As already noted, Martí has repeatedly written in previous posts that those leaders perpetrated a *coup d’etat* from a constitutional perspective. I would think that such an action causes harm. Can a *coup d’état* be harmless?

Furthermore, as already observed, the Supreme Court concluded that the evidence shows that violence was resorted to by secessionists, even if it was not of the serious kind that the crime of rebellion requires. So I am surprised that Martí maintains that “everyone knows” that the only harm was caused by the police. Martí should not take for granted that “everyone knows” this, when this is actually denied by many, including the Supreme Court after assessing the evidence.

Martí also argues that, “since there is such controversy about the correct interpretation of the crime of sedition”, the Supreme Court should have picked up “the most restrictive interpretation of the crime”, which would have led to an acquittal. I don’t have enough space here to explain why I don’t think this is the way we should solve interpretive problems when applying a criminal code. But even if the Court had espoused a very narrow interpretation, under which some “element of violence and significant harm” must have been caused, as Martí suggests against the letter of the article, I still don’t see how the secessionist leaders should have been acquitted, in light of what the Court has found as to the facts.

The right to protest

Martí’s main claim, however, appears in the last section of his post, where he invokes the democratic rights of protest (freedom of expression, freedom of assembly, and the right to participate in demonstrations) to challenge the Court’s decision. According to Martí, there is an opposition between the crime of sedition and the democratic right to protest, so that an extensive interpretation of the crime leads to an unconstitutional restriction of the right.

Martí mentions some past instances where protesters who had caused public disorders were not charged with the crime of sedition. He correctly says that the Supreme Court has introduced by way of interpretation certain elements of the crime so that only certain kinds of actions will be regarded as seditious, while others will be taken to amount to lesser crimes, or no crimes at all. As Martí summarizes the Court’s holding, for an uprising to be seditious it must be (a) massive or crowded, (b) generalized in the territory, and (c) strategically planned. This holding permits the Court to implicitly distinguish this case from earlier instances of protest that had occurred in Spain. Note that the Court is actually narrowing down the scope

of the crime, not expanding it. We may agree or disagree as to whether the Court has successfully distinguished the different cases. I don't have a strong opinion on this, but I do think it makes sense to draw lines depending on the extent to which the constitutional order is endangered by the relevant conduct. It is one thing for protestors to prevent an eviction judgment to be enforced by the police, or to make it impossible for some political representatives to enter parliament, or to occupy public squares illegally. It is quite another, I submit, to hinder the task of public authorities through a set of actions that are part of a systematic plan to achieve Catalonia's independence through a *coup d'état*. You might say this is a question of degree, but questions of degree often matter in the eyes of the law. It is worthy of note, by the way, that citizens who protested in September and October, and those who voted in the referendum, have not be tried, nor will they be.

Martí relies heavily on the right to protest, and criticizes the Supreme Court for treating it as an "exotic right". The Court, of course, recognizes the constitutional protection of the right to protest, but insists that it cannot be transformed into an "exotic right to physically prevent the police officers from enforcing the law or a judicial decision, and to do it in a generalized manner in the whole territory of the regional Autonomous Community". I concur with Martí's claim that we should be careful when defining the limits of the right to protest, and that an expansive interpretation of the Criminal Code may lead to the infringement of the right. But I suggest we should avoid a simplistic understanding of the problem. Take the case of protesters that physically prevent members of parliament from entering the assembly to do their tasks as representatives. This is not simply a conflict between the fundamental right of protesters, on the one hand, and public interests, on the other. Fundamental rights appear on both pans of the scale. Citizens have a fundamental right to protest, sure, but they also have an equally basic right to elect their representatives, and the latter have a basic right to carry out the functions for which they have been elected. There is a clash of rights, at least apparently, and we need to harmonize them. It would be naive (and I am sure Martí will agree) to suggest we should never criminalize any form of protest at all, in order to secure fundamental rights. Non-criminalization produces costs, also in terms of protection of fundamental rights.

In a more philosophical vein, Martí refers to the work of Philip Pettit to emphasize the centrality of the right to protest in a scheme of contestatory democracy. I think this reference is illuminating for our discussion, though I have reservations about Martí's claim that, when discussing questions of political legitimacy, "everything starts with the most basic right to protest and contest the decisions made by your authorities". I am uneasy with the notion that "everything starts with" a particular value. I am inclined to a more coherentist and holistic approach when thinking about the grounds and conditions for the construction of a legitimate political order.

More importantly, if we think about freedom of speech in light of a republican conception of liberty, it is critical to take into account the material conditions that affect people's choices. You may be formally free to speak your mind, but you may face circumstances of subordination that make it materially unlikely you will speak up. I say this because Martí's argument on the chilling effect that the

Supreme Court's decision may generate when it comes to exercising one's right to protest should be placed in a wider context. I side with Martí when he urges us to be careful about the contours of the crime of sedition and other crimes that may be applicable when citizens protest. But let us look at the broader picture from a republican perspective, to get the priorities right. Regarding protest and speech, the most serious problem in Catalonia is not that secessionists (or other movements in the future) may abstain from performing legitimate acts of protest for fear of the criminalizing consequences of the Supreme Court's decision under examination. The gravest concern relates to the difficulty many people in Catalonia face when trying to express their rejection of secessionist ideas. Yes, those citizens are formally recognized the right to speak. As a matter of fact, however, secessionism is the hegemonic ideology held by the structures of power at the regional level in Catalonia, and it penetrates many institutional and social spheres, including public schools. The problem is especially serious in the interior parts of Catalonia, where the secessionist discourse in official and public domains is just overwhelming. Since I know Martí is sensitive to this concern, given his republican conception of liberty, I would have appreciated some mention of this issue.

A final note

I'd like to end my comment on Martí's thought-provoking piece with this note: I fully support his conclusion that the Catalan conflict "is not fixed by this decision". I have met no one who thinks that fixing the problem was the Court's call, however. It is for political actors to work out a solution to bring things back to constitutional normalcy, and to discuss legal and political changes to better accommodate the aspirations of a majority of Catalan citizens. If pardoning the secessionist leaders is part of the solution, politicians should take the appropriate steps and bear responsibility for their decisions. But we cannot require a court of justice to balance all these political considerations when adjudicating a case. The harshness of the sentences that have been imposed, moreover, will probably be softened in practice soon, through the application of the penitentiary regime, administered by the Catalan authorities, which allows for permissions to be granted to prisoners to serve part of their sentences out of prison (the so-called "semi-open regime"). Meanwhile, it will be interesting to see what the Spanish Constitutional Court and the European Court of Human Rights have to say with respect to the fundamental rights at stake. I am sure Martí will write an illuminating post on those decisions when they are handed down in the future, thus enriching our legal and philosophical discussions.
